

EXPLANATORY STATEMENT

Telecommunications (Consumer Protection and Service Standards) Act 1999

Telecommunications (Participating Persons) Determination 2015

Issued by the Authority of the Minister for Communications

Authority

The *Telecommunications (Participating Persons) Determination 2015* (**Determination**) is made by the Minister for Communications (the **Minister**) under subsection 44(2) of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (**Act**). This provision provides that the Minister may determine in writing that a certain kind of person is not a ‘participating person’ for an eligible revenue period under the Act.

Purpose

The Determination exempts certain persons from being a ‘participating person’ under section 44 of the Act. A consequence of this exemption is that such a person will not have to lodge an eligible revenue return with the Australian Communications and Media Authority (**ACMA**) for the relevant eligible revenue period and so be relieved from the liability to pay the levy amount (i.e. the amount assessed under section 50 of the Act) in relation to the subsequent eligible levy period.

Background

On 1 July 2012, the Telecommunications Universal Service Management Agency (**TUSMA**) was established and the previous Universal Service Obligation and the National Relay Service levies, administered under the *Telecommunications (Consumer Protection and Service Standards) Act 1999*, were replaced with a single levy, the Telecommunications Industry Levy (**TIL**). The TIL together with government funding, covered TUSMA’s costs for the implementation and administration of service contracts or grants to deliver universal service and other public policy telecommunications outcomes.

On 1 July 2015, TUSMA was abolished and its functions transferred to the Department of Communications (**Department**). The abolition of TUSMA is in line with the Australian Government’s agenda of cutting red tape to reduce the regulatory burden on industry and increases industry certainty by having a single agency responsible for policy and implementation (contract management) of telecommunications universal service matters. The process for assessing and collecting the TIL is no longer contained in the *Telecommunications Universal Service Management Agency Act 2012* (**TUSMA Act**), but instead is dealt with under the Act. A combination of funds raised under the TIL and dedicated government funding will continue to be used to meet the costs of service contracts or grants to deliver universal service and other public policy telecommunications outcomes (with the contracts and grants administered by the Department). The Determination replaces the *Telecommunications (Participating Persons) Determination 2013 (No. 2)* previously made under the TUSMA Act.

Under subsection 44(1) of the Act, a person is a ‘participating person’ for an eligible revenue period if:

- the person was a carrier at any time during the eligible revenue period (paragraph 44(1)(a) of the Act); or
- the Minister has made a written determination that carriage service providers are participating persons for the eligible revenue period and the person was a carriage service provider at any time during the eligible revenue period (paragraph 44(1)(b) of the Act).

Currently, there is no written Ministerial determination under paragraph 44(1)(b) of the Act.

Previous determination

On 26 June 2013, the *Telecommunications (Participating Persons) Determination 2013 (No. 2) (PP Determination 2013 (No. 2))* was made under the TUSMA Act. Persons who had revenue below the \$25 million threshold and who had submitted an eligible statutory declaration were exempted from being a ‘participating person’ under the TUSMA Act in relation to the relevant eligible revenue period. A person was also exempted from being a ‘participating person’ where:

- the person was an externally-administered body corporate or deregistered at the end of the specified timeframe (that is, the time by which participating persons were required to submit an eligible revenue return to the ACMA);
- an eligible statutory declaration was not provided to the ACMA within the specified timeframe; and
- the ACMA was reasonably satisfied that had such a declaration been provided, the requirements of being a non-participating person would have been met.

The Determination substantially remakes the PP Determination 2013 (No. 2) under the Act and applies in relation to all eligible revenue periods under the Act.

The Determination contains three amendments:

- A minor amendment has been made to expand the types of persons who can lodge an eligible statutory declaration on behalf of a company to include a person authorised in writing by the company. This amendment will ensure additional flexibility for companies to appropriately delegate this administrative task in order to meet statutory timeframes.
- An amendment has been made to provide the ACMA with flexibility in how it obtains an assurance that a person’s revenue was below the relevant \$25 million threshold during an eligible revenue period. This flexibility will allow the ACMA to determine that a person is a ‘non-participating person’ where the person did not submit an eligible statutory declaration but the ACMA was otherwise satisfied that the person’s revenue was below the relevant \$25 million threshold. For example, the person may have submitted a full return of its eligible revenue or may have submitted a statutory declaration which, due to a minor administrative error, did not meet the requirement for submission of an ‘eligible statutory declaration’ within the specified timeframe.

- Paragraph 4(3)(d) of the PP Determination 2013 (No. 2) has been deleted. This paragraph dealt with companies which had been deregistered or which were subject to external administration. It is no longer required as the amendments to paragraphs 4(3)(a), 4(3)(b) and 4(3)(c) of the Determination will allow the ACMA to determine that such persons are ‘non-participating persons’ under those paragraphs.

As with the PP Determination 2013 (No. 2), the Determination provides clear benefits to smaller carriers by reducing their compliance burden. These benefits are achieved by absolving such persons from having to submit eligible revenue returns to the ACMA under the Act, which can be a resource-intensive and time-consuming process. While larger entities may be able to absorb such burdens, smaller entities may have greater difficulties in doing so.

As the Determination replaces the PP Determination 2013 (No. 2), the Determination does not impose new obligations on participating persons, or alter their existing obligations.

Consultation

The Australian Communications and Media Authority was consulted in relation to the making of this Determination.

An exposure draft of this Determination was provided in June 2015 to carriers who were participating persons in prior eligible revenue periods. Carriers were provided with a three week period to review the exposure draft and provide any comments. No issues were raised.

Regulatory impact

The Office of Best Practice Regulation has advised that the regulatory changes arising from the Determination are minor or machinery in nature and that no further regulatory impact analysis is required.

Statement of compatibility with human rights

This statement of compatibility is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

The Determination exempts certain persons from being participating persons for the purposes of the Act. This will alleviate these persons from lodging an eligible revenue return with the ACMA. As a consequence, no eligible revenue will be assessed and those persons will not have a levy liability assessed under the Act for the subsequent eligible levy period. The Determination is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act*. It does not engage any of the applicable rights or freedoms and does not raise any human rights issues.

The Determination is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Notes on sections

Section 1 - Name of Determination

Section 1 provides that the name of the Determination is the *Telecommunications (Participating Persons) Determination 2015*.

Section 2 - Commencement

Section 2 provides that the Determination commences on the day after it is registered on the Federal Register of Legislative Instruments.

Section 3 - Application

Section 3 provides that the Determination applies in relation to all eligible revenue periods under the Act – that is the 2013-14 eligible revenue period and subsequent eligible revenue periods.

Section 4 - Definitions

Section 4 defines the terms used in the Determination.

Subsection 4(1) – General definitions

The definitions used in this provision are substantially replicated from subsections 4(1) and 4(2) of the PP Determination 2013 (No. 2).

The term ‘specified timeframe’ is used in subsection 4(3) of the Determination and refers to the date specified in an instrument made by the ACMA under paragraph 43(1)(b) of the Act. Currently, the specified timeframe is four months following the end of the eligible revenue period, as set out in the *Telecommunications (Eligible Revenue) Determination 2015 (Eligible Revenue Determination)*.

The term ‘ultimate Australian parent entity’ is defined as having the same meaning as in the Eligible Revenue Determination. Section 5 of the Eligible Revenue Determination provides this definition.

A person’s initial sales revenue, gross telecommunications sales revenue and eligible revenue for the purposes of the Determination are to be calculated with reference to each of those amounts under:

- the Act (in the case of eligible revenue); and/or
- the Eligible Revenue Determination (in the case of initial sales revenue, gross telecommunications sales revenue and eligible revenue),

as if that person were a participating person under the Act.

Subsection 4(2) – ‘eligible statutory declaration’

Subsection 4(2) defines the term ‘eligible statutory declaration’ for the purposes of the Determination. The declaration must be made by a person with appropriate authority for the company or individual and comply with the requirements set out in the *Statutory Declarations Act 1959 (Stat Dec Act)*. A minor amendment was made in the Determination to expand the types of persons who can lodge an eligible statutory declaration on behalf of a company to include any person authorised in writing by the company to make the declaration.

The reason for this amendment was to ensure additional flexibility for companies to appropriately delegate this administrative task.

Under the Stat Dec Act, a person who wilfully makes a false statement is guilty of an offence and may be fined, jailed or both.

Subsection 4(3) – ‘non-participating person’

Subsection 4(3) defines the term ‘non-participating person’. Paragraphs 4(3)(a), (b) and (c) provide that if a person’s initial sales revenue, gross telecommunications sales revenue or eligible revenue is less than the \$25 million threshold and this fact is supported either by an eligible statutory declaration provided to the ACMA within the specified timeframe, or by the ACMA otherwise being reasonably satisfied, then a person will be a ‘non-participating person’.

An example of how subsection 4(3) works is set out below.

Example 1 – Carriers that can lodge eligible statutory declarations

For a given eligible revenue period:

Carrier	Initial sales revenue	Gross telecommunications sales revenue	Eligible revenue
Carrier A	\$20 million	\$15 million	\$10 million
Carrier B	\$40 million	\$24 million	\$12 million

Carrier A will satisfy the thresholds in paragraphs 4(3)(a), 4(3)(b) and 4(3)(c) as its initial sales revenue, gross telecommunications sales revenue and eligible revenue are all under \$25 million. Carrier B will also satisfy the thresholds in paragraphs 4(3)(b) and 4(3)(c) as its gross telecommunications sales revenue and eligible revenue are both under \$25 million.

If eligible statutory declarations are provided separately by Carrier A and Carrier B or the ACMA is otherwise reasonably satisfied in relation to one of these paragraphs, they will be non-participating persons under the Determination.

Example 2 – Carrier ceases to exist

For a given eligible revenue period:

Carrier	Initial sales revenue	Gross telecommunications sales revenue	Eligible revenue
Carrier C (ceased to exist before the end of the specified timeframe)	\$40 million	\$24 million	\$12 million

Carrier C ceased to exist before the end of the specified timeframe and did not submit an eligible statutory declaration. The ACMA is otherwise reasonably satisfied that Carrier C’s

gross telecommunications sales revenue and eligible revenue are both under \$25 million and determines that Carrier C is a non-participating person (as Carrier C satisfies paragraphs 4(3)(b) and 4(3)(c)).

Subsection 4(4) - ultimate Australian parent entity

Subsection 4(4) sets out that if a person has the same ‘ultimate Australian parent entity’ (a term defined in the Eligible Revenue Determination) as one or more other carriers (or carriage service providers, if a determination under paragraph 44(1)(b) of the Act is in force), then each carrier must calculate initial sales revenue, gross telecommunications sales revenue or eligible revenue on a group basis, accounting for revenues and deductions as a whole.

As with the PP Determination 2013 (No. 2), subsection 4(4) has been included to protect against an ultimate Australian parent entity from artificially restructuring a group of entities so that no individual entity had revenue that exceeded the \$25 million threshold (i.e. so that each individual entity was a ‘non-participating person’). In submitting eligible revenue returns, the group is able to choose how to account for revenue/deduction calculations, in accordance with the options available under the Eligible Revenue Determination (i.e. either as a group or on an individual basis). An example of how subsection 4(4) operates is set out below.

Example 3 – ‘ultimate Australian parent entity’

Carrier	Initial sales revenue	Gross telecommunications sales revenue	Eligible revenue
Carrier D (Parent Company)	\$40 million	\$26 million	\$12 million
Carrier E	\$20 million	\$13 million	\$10 million
Combined revenue for Carrier D and Carrier E	\$60 million	\$39 million	\$22 million

In an eligible revenue period, Carrier D is the parent company of Carrier E. Applying the terms of subsection 4(4) of the Determination, this means Carrier D must calculate its initial sales revenue, gross telecommunications sales revenue or eligible revenue under the Determination on a group basis (i.e. together with Carrier E).

The combined revenue for Carrier D and Carrier E will be greater than the thresholds in paragraphs 4(3)(a) and 4(3)(b) of the Determination as the combined initial sales revenue and gross telecommunications sales revenue are above \$25 million. However, as the combined eligible revenue for Carrier D and Carrier E is below \$25 million, the threshold in paragraph 4(3)(c) of the Determination would be satisfied.

If eligible statutory declarations are provided by both Carrier D and Carrier E or the ACMA is otherwise reasonably satisfied in relation to paragraph 4(3)(c) of the Determination, both carriers will be non-participating persons under the Determination.

Section 5 - Determination

Section 5 exempts a person who is a non-participating person for an eligible revenue period from section 44 of the Act for that eligible revenue period. The Determination applies to all eligible revenue periods under the Act.

Section 44 of the Act specifies who is, for the purpose of the Act, a participating person for an eligible revenue period. An exemption from section 44 of the Act will mean that the person does not have eligible revenue assessed under section 47 of the Act for that eligible revenue period.